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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 666

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, to attempt wilfully "in any manner to evade or defeat" the income tax. In the overwhelming majority of cases prosecuted under Section 145 (b), the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145 (b) has been uniformly and repeatedly recognized by this Court [1] and the courts of appeals.[2]

[1] *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 149, 159.

[2] E. g., *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1), certiorari denied, 340 U. S. 917; *United States* v. *Rosenblum*, 176 F.

The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616 (a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax.[3] In the instant case, as in *Berra* v. *United States,* 351 U. S. 131, and indeed almost every case prosecuted under Section 145 (b), the proof that the defendant wilfully attempted to evade taxes by filing a false return[4] is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616 (a). In this respect Sections 145 (b) and 3616 (a) overlap.

On the basis of this overlap, petitioner contends that his sentence of five years' imprisonment and fines totalling $20,000 was illegal and in excess of the maximum authorized by law. He argues that wherever, as here, the method of evasion charged in the indictment is the filing of a false return, Section 3616 (a) "controls over" Section 145 (b), and no punishment can be imposed in excess of that authorized by the

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2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C. A. D. C.); *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8), certiorari denied, 331 U. S. 847.

[3] This Court so assumed, *arguendo*, in *Berra* v. *United States*, 351 U. S. 131, 133. The relevant authorities are cited in the Government's brief in the *Berra* case, pages 23–24.

[4] The proof at the trial of this case showed that the filing of false returns was not the only "manner" of attempted tax evasion used by petitioner. The evidence showed, in addition, the following: false bookkeeping entries, failure to keep records of income, concealment of assets, etc. (App. 14a–16a.)

former provision. The Government disagrees. Petitioner's argument, if accepted, would in effect repeal Section 145 (b) as applied to filing false returns with intent to evade the income tax. Moreover, petitioner labors under the misapprehension that the trial judge's authority to impose a sentence exceeding one year's imprisonment and $1,000 fine derives from the fact that the indictment cited Section 145 (b) as the statute alleged to have been violated.[5] The authority of a trial judge to impose sentence in a criminal case derives from Congress. Unless Section 145 (b) is deemed to be repealed by implication or otherwise inapplicable, it empowered the trial judge to impose the sentence he did in this case upon petitioner's conviction for wilfully attempting to evade income tax. If an indictment is valid in charging an offense under Section 145 (b),[6] and if the proof supports the de-

[5] Rule 7 (c) of the Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

[6] Section 145 (b) punishes wilful attempted evasion of income tax in *any* manner, without necessarily filing a false return. Evasion can be attempted in various other ways; the filing of a false return is not an essential ingredient of the offense of violating Section 145 (b). *Spies* v. *United States*, 317 U. S. 492, 499–500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. Hence, omission of an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of an indict-

fendant's conviction under that section, the trial judge is empowered, in his discretion, to impose any sentence that is lawful under that section, even though the proof may also show violation of another statute fixing a lesser penalty.

Although the Government believes the decision below to be correct, the question raised by petitioner, which was explicitly left undecided by this Court last term in the *Berra* case (351 U. S. 131, 135), is being raised with increasing frequency in the lower courts. The question was sought to be presented in several cases this term in which the Court denied certiorari, presumably because the record did not properly present the issue.[7] It may be assumed that, until definitively resolved by this Court, the question will continue to be litigated in the lower courts. Since this

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ment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7). However, an indictment which failed to allege the filing of a false return could not be valid under Section 3616 (a), since that section in terms makes such a filing an essential element of the offense. Moreover, Section 3616 (a) punishes false returns under *every* kind of federal tax, while Section 145 (b) is limited to *income* tax violations. Accordingly, even though in a particular case the proof may show violation of both sections, the offenses defined in the two provisions are "not identical" and "are entirely distinct in point of law" (*United States* v. *Noveck*, 273 U. S. 202, 206); each "proscribes conduct not covered by the other" (*United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45). Cf. *United States* v. *Gilliland*, 312 U. S. 86, 95–96.

[7] *Doyle* v. *United States*, 234 F. 2d 788 (C. A. 7), certiorari denied, 352 U. S. 893; *Achilli* v. *United States*, 234 F. 2d 797 (C. A. 7), certiorari denied, 352 U. S. 916; *United States* v. *Moran*, 236 F. 2d 361 (C. A. 2), certiorari denied, 352 U. S. 909.

case arises on an application for correction of an allegedly illegal sentence, the question appears to be presented in a proper posture for decision here. Accordingly, the Government does not oppose the granting of the petition for certiorari.

Respectfully submitted.

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